

**Rule 28. Appeals to Court of Appeals****Rule 28.01 Scope of Rule**

**Subd. 1. Appeals from District Court.** In misdemeanor, gross misdemeanor, and felony cases, Rule 28 governs the procedure for appeals from the district courts to the Court of Appeals unless the defendant has been convicted of first-degree murder.

**Subd. 2. Applicability of Rules of Civil Appellate Procedure.** To the extent applicable, the Minnesota Rules of Civil Appellate Procedure govern appellate procedure unless these rules direct otherwise.

**Subd. 3. Suspension of Rules.** For good cause, the Court of Appeals may suspend application of any of these rules on its own initiative or on a party's motion, and may order proceedings as it directs, but it may not alter the time for filing the notice of appeal unless permitted by Rule 28.02, subd. 4(3)(g).

**Rule 28.02 Appeal by Defendant**

**Subd. 1. Review by Appeal.** A defendant may obtain Court of Appeals review of district court orders and rulings only as these rules permit, or as permitted by the law for the issuance of the extraordinary writs and for the Postconviction Remedy. Writs of error are abolished.

**Subd. 2. Appeal as of Right.**

(1) Final Judgment and Postconviction Appeal. A defendant may appeal as of right from any adverse final judgment, or from an order denying in whole or in part a petition for postconviction relief under Minnesota Statutes, chapter 590. A final judgment within the meaning of these rules occurs when the district court enters a judgment of conviction and imposes or stays a sentence.

(2) Orders. A defendant cannot appeal until the district court enters an adverse final judgment, but may appeal:

(a) from an order refusing or imposing conditions of release; or

(b) in felony and gross misdemeanor cases from an order:

1. granting a new trial, and the defendant claims that the district court should have entered a final judgment in the defendant's favor;

2. not on the defendant's motion, finding the defendant incompetent to stand trial;  
or

3. denying a motion to dismiss a complaint following a mistrial, and the defendant claims retrial would violate double jeopardy.

(3) Sentences. A defendant may appeal as of right from any sentence imposed or stayed in a felony case. Subdivision 3 governs sentencing appeals in non-felony cases.

**Subd. 3. Discretionary Review.** In the interests of justice and on petition of the defendant, the Court of Appeals may allow an appeal from an order not otherwise appealable, but not from an order made during trial. The petition must be served and filed within 30 days after entry of the order appealed. Minn. R. Civ. App. P. 105 governs the procedure for the appeal.

**Subd. 4. Procedure for Appeals Other than Sentencing Appeals.**

(1) Service and Filing. A defendant appeals by filing a notice of appeal with the clerk of the appellate courts with proof of service on the prosecutor, the Minnesota Attorney General, and

the court administrator for the county in which the judgment or order appealed from is entered. The defendant need not file the statement of the case provided for in Minn. R. Civ. App. P. 133.03 unless the appellate court directs otherwise. The defendant does not have to post bond to appeal. The defendant's failure to take any step other than timely filing the notice of appeal does not affect the validity of the appeal, but permits action the Court of Appeals deems appropriate, including dismissal.

(2) Contents of Notice of Appeal. The notice of appeal must specify:

- (a) the party or parties taking the appeal;
- (b) the names, addresses, and telephone numbers of all counsel and whom they represent;
- (c) the judgment or order from which appeal is taken; and
- (d) that the appeal is to the Court of Appeals.

(3) Time for Taking an Appeal.

(a) In felony and gross misdemeanor cases, an appeal by the defendant must be filed within 90 days after final judgment or entry of the order being appealed. Other charges that were joined for prosecution with the felony or gross misdemeanor may be included in the appeal.

(b) In misdemeanor cases, an appeal by the defendant must be filed within 30 days after final judgment or entry of the order being appealed.

(c) In postconviction relief cases, an appeal by the defendant from an order denying a petition for postconviction relief must be filed within 60 days after entry of the order.

(d) A notice of appeal filed after the announcement of a decision or order - but before sentencing or entry of judgment or order - must be treated as filed after, but on the same day as sentencing or entry of judgment.

(e) A timely motion to vacate the judgment, for judgment of acquittal, or for a new trial tolls the time for an appeal from a final judgment until the entry of an order denying the motion, and the order denying the motion may be reviewed in the appeal from the judgment.

(f) A judgment or order is entered under these appellate rules when the court administrator enters it in the record.

(g) For good cause, the district court or a judge of the Court of Appeals may, before or after the time for appeal has expired, with or without motion and notice, extend the time for filing a notice of appeal up to 30 days from the expiration of the time prescribed by these rules.

(4) Stay of Appeal for Postconviction Proceedings. If, after filing a notice of appeal, a defendant determines that a petition for postconviction relief is appropriate, the defendant may file a motion to stay the appeal for postconviction proceedings.

**Subd. 5. Proceeding in Forma Pauperis.** A defendant who wishes to proceed in forma pauperis under this rule must follow this process:

(1) An indigent defendant wanting to appeal or to obtain postconviction relief must apply to the State Public Defender's office.

(2) The State Public Defender's office must promptly send the applicant a financial inquiry form, preliminary questionnaire form, and other forms as deemed appropriate.

(3) The applicant must completely fill out these forms, sign them, and have his or her signature notarized if indicated.

(4) The applicant must then return these completed documents to the State Public Defender's office for further processing.

(5) The State Public Defender's office must determine if the applicant is financially and otherwise eligible for representation. If the applicant qualifies, then the State Public Defender's office must provide representation in felony cases regarding a judicial review or an evaluation of the merits of a judicial review of the case, and may so represent the applicant in misdemeanor or gross misdemeanor cases.

Upon the administrative determination by the State Public Defender's office that it will represent an applicant for a judicial review or an evaluation of the merits of a judicial review of the case, the office is automatically appointed without order of the court. The State Public Defender's office must notify the applicant of its decision on representation and advise the applicant of any problem relative to the applicant's qualifications to obtain its services. Any applicant who contests a decision of the State Public Defender's office that the applicant does not qualify for representation may apply to the Minnesota Supreme Court for relief.

(6) If the court receives a request for transcripts necessary for judicial review or other efforts to have cases reviewed from a defendant who does not have counsel, the court must refer the request to the State Public Defender's office for processing as in paragraphs (2) through (5) above.

(7) The State Public Defender's office's obligation to order and pay for transcripts for indigent defendants represented by private counsel on appeal is limited to the types of appeals or proceedings for which the State Public Defender's office is required to provide representation. If the court receives a request for transcripts made by an indigent defendant represented by private counsel, the court must submit the request to the State Public Defender's office for processing as follows:

a. The State Public Defender's office must determine eligibility of the applicant as in paragraphs (2) through (5) above.

b. If the defendant qualifies, he or she may request the State Public Defender to order all parts of the trial transcript necessary for effective appellate review. The State Public Defender's office must order and pay for these transcripts.

c. If a dispute arises about the parts of the trial transcript necessary for effective appellate review, the defendant or the State Public Defender's office may make a motion for resolution of the matter to the appropriate court.

d. The State Public Defender's office must provide the transcript to the indigent defendant's attorney for use in the direct appeal. The attorney must sign a receipt for the transcript agreeing to return it to the State Public Defender's office after the appeal process.

(8) All court administrators must furnish the State Public Defender's office without charge copies of any documents relevant to the case.

(9) All fees - including appeal fees, hearing fees, or filing fees - ordinarily charged by the clerk of the appellate courts or court administrators are waived when the State Public Defender's office, or other public defender's office, represents the defendant. The court must also waive these fees on a sufficient showing by any other attorney that the defendant cannot pay them.

(10) The State Public Defender's office must be appointed to represent all eligible indigent defendants in all appeal or postconviction cases as provided above, regardless of the county where the prosecution occurred, unless the Supreme Court directs otherwise.

(11) In appeal cases and postconviction cases, the State of Minnesota must bear the cost of transcripts and other necessary expenses from funds available to the State Public Defender's office, if approved by that office, regardless of where the prosecution occurred.

(12) For defendants represented on appeal by the State Public Defender's office, Minn. R. Civ. App. P. 110.02 subd 2, concerning the transcript certificate, does not apply. In these cases, the State Public Defender's office on ordering the transcript must transmit a copy of the written request for transcript to the court administrator, the clerk of the appellate courts, and the prosecutor.

The court reporter must promptly acknowledge its receipt and indicate acceptance in writing, with copies to the court administrator, the clerk of the appellate courts, the State Public Defender's office, and the prosecutor. In so doing, the court reporter must state the estimated number of pages of the transcript and the estimated completion date. That date cannot exceed 60 days, but for guilty plea and sentencing transcripts, it cannot exceed 30 days. Upon delivery of the transcript, the reporter must file with the clerk of the appellate courts a certificate evidencing the date and manner of delivery.

(13) A defendant may proceed pro se on appeal only after the State Public Defender's office has first had the opportunity to file a brief on the defendant's behalf. When that office files and serves the brief, it must also provide a copy of the brief to the defendant. If the defendant then chooses to proceed pro se on appeal or to file a supplemental brief, the defendant must so notify the State Public Defender's office.

(14) Upon receiving notice under paragraph (13) that the defendant has chosen to proceed pro se on appeal or to file a supplemental brief, the State Public Defender's office must confer with the defendant about the reasons for choosing to do so and advise the defendant concerning the consequences of that choice.

(15) To proceed pro se on appeal following consultation, the defendant must sign and return to the State Public Defender's office a detailed waiver of counsel as provided by that office for the particular case.

(16) If the State Public Defender's office believes, after consultation, that the defendant may not be competent to waive counsel it must assist the defendant in seeking an order from the district court determining the defendant's competency or incompetency.

(17) The court must consider the brief filed by the State Public Defender's office on the defendant's behalf. A defendant, whether or not choosing to proceed pro se, may also file with the court a supplemental brief. The supplemental brief must be filed within 30 days after the State Public Defender's office files its initial brief.

(18) If a defendant requests a copy of the transcript, the State Public Defender's office must confer with the defendant concerning the need for the transcript. If the defendant still requests a copy of it, one must be provided to the defendant temporarily.

(19) Upon receiving the transcript, the defendant must sign a receipt for it including an agreement not to make it available to other persons and to return the transcript to the State Public Defender's office when the time to file any supplemental brief expires.

(20) The transcript remains the property of the State Public Defender's office and must be returned upon expiration of the time to file any supplemental brief. Upon return of the transcript,

the State Public Defender's office must provide the defendant with a copy of a signed receipt for it. The State Public Defender's office must promptly file the receipt with the clerk of the appellate courts, and until that occurs, the clerk will not accept the supplemental brief for filing.

**Subd. 6. Stay.** When a defendant files an appeal, this does not stay execution of the judgment or sentence unless a district court judge or a judge of the appellate court grants a stay.

**Subd. 7. Release of Defendant.**

(1) Conditions of Release. If a defendant appeals, and a court grants a stay, Rule 6.02, subds. 1 and 2, govern the conditions for defendant's release and the factors determining the conditions of release, except as provided by this rule. The court must also take into consideration that the defendant may be compelled to serve the sentence imposed before the appellate court decides the case.

(2) Burden of Proof. If a defendant was sentenced to incarceration, a court must not grant release pending appeal from a judgment of conviction unless the defendant establishes to the court's satisfaction that:

(a) the appeal is not frivolous or taken for delay; and

(b) no substantial risk exists that the defendant:

(i) will fail to appear to answer the judgment following the conclusion of the appellate proceedings;

(ii) is likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice.

(3) Application for Release Pending Appeal. A defendant must first apply to the district court for release pending appeal. If the district court denies release pending appeal or imposes conditions of release, the court must state on the record the reasons for the action taken.

If the defendant appeals and has previously applied to the district court for release pending appeal, the defendant may file a motion for release, or for modification of the conditions of release, to the applicable appellate court or to a judge or justice of that court. The motion must be determined promptly upon such documents and portions of the record as the parties may present, and after reasonable notice to the prosecutor. The appellate court or one of its judges or justices may order the defendant's release pending the motion's disposition.

(4) Credit for Time Spent in Custody. All time the defendant spends in custody pending an appeal must be deducted from the sentence the district court imposed.

(5) When a defendant obtains release pending appeal under this rule, the prosecution must make reasonable good faith efforts as soon as possible to advise the victim of the defendant's release.

**Subd. 8. Record on Appeal.** The record on appeal consists of the documents filed in the district court, the offered exhibits, and the transcript of the proceedings, if any.

In lieu of the record as defined by this rule, the parties may - within 60 days after filing of the notice of appeal - prepare, sign, and file with the court administrator a statement of the case showing how the issues presented by the appeal arose and how the district court decided them, stating only the claims and facts essential to a decision. The district court, after making any additions it considers necessary to present the issues raised by the appeal, may approve the statement, which will then be the record on appeal. Any recitation of the essential facts of the case, conclusions of law, and any relevant district court memorandum of law must be included with the record.

An appellant who intends to proceed on appeal with a statement of the case under this rule rather than by obtaining a transcript, or without either a statement of the case or transcript, must serve notice of intent to do so on respondent and the court administrator and also file the notice with the clerk of the appellate courts, all within the time provided for ordering a transcript.

**Subd. 9. Transcript of Proceedings and Transmission of the Transcript and Record.** To the extent applicable, the Minnesota Rules of Civil Appellate Procedure govern preparation of the transcript of the proceedings and the transmission of the transcript and record to the Court of Appeals, except that the appellant must order the transcript, and any requested paper copies, within 30 days after filing of the notice of appeal unless the time is extended by the appellate court for good cause. Any other party may request a paper copy of the transcript as provided in Minnesota Rule of Civil Appellate Procedure 110.02, subd. 2(b), within 10 days of the filing of either the transcript request or the court reporter's acknowledgment and acceptance of the transcript request, whichever is later. The transcript must be filed with the court administrator and a copy transmitted promptly to the attorney for each party.

If the parties have stipulated to the accuracy of a transcript of videotape or audiotape exhibits and made it part of the district court record, it becomes part of the record on appeal and it is not necessary for the court reporter to transcribe the exhibits. If no such transcript exists, a transcript need not be prepared unless expressly requested by the appellant or the respondent. If the exhibit must be transcribed, the court reporter need not certify the correctness of this transcript.

If the appellant does not order the entire transcript, then within the 30 days permitted to order it, the appellant must file with the clerk of the appellate courts and serve on the court administrator and respondent a description of the parts of the transcript the appellant intends to include in the record, and a statement of the issues the appellant intends to present on appeal. If the respondent deems a transcript of other parts of the proceedings necessary, the respondent must order from the reporter, within ten days of service of the description or notification of no transcript, those other parts deemed necessary, or serve and file a motion in the district court for an order requiring the appellant to do so.

**Subd. 10. Briefs.** The appellant must serve and file the appellant's brief within 60 days after the court reporter delivers the transcript, or after the filing of the district court's approval of the statement under subd. 8 of this rule or under Minn. R. Civ. App. P. 110.03. In all other cases, if the parties obtain the transcript before the appeal, or if the record on appeal does not include a transcript, the appellant must serve and file the appellant's brief within 60 days after the appellant filed the notice of appeal. The respondent must serve and file the respondent's brief within 45 days after service of the appellant's brief. The appellant may serve and file a reply brief within 15 days after service of the respondent's brief. In all other respects, the Minnesota Rules of Civil Appellate Procedure govern, to the extent applicable, the form and filing of briefs, but the appellant's brief must contain a procedural history.

**Subd. 11. Scope of Review.** On appeal from a judgment, the court may review any order or ruling of the district court or any other matter, as the interests of justice may require.

**Subd. 12. Action on Appeal.** If the appellate court affirms the judgment, it must direct execution of the sentence as pronounced by the district court or as modified by the appellate court under Rule 28.05, subd. 2. If it reverses the judgment, it must:

- (a) direct a new trial;
- (b) vacate the conviction and enter a judgment of acquittal; or

(c) reduce the conviction to a lesser included offense or to an offense of lesser degree, as the case may require. If the court reduces the conviction, it must remand for resentencing.

**Subd. 13. Oral Argument.**

(1) Oral argument must be held in every case if either party serves on adverse counsel and files with the clerk of the appellate courts a request for it when the party serves and files its initial brief, unless:

1. the respondent forfeits oral argument under Minn. R. Civ. App. P. 134.01(b) for failure to timely file a brief, and appellant has either waived oral argument or not requested it;
2. the parties waive oral argument by joint agreement under Minn. R. Civ. App. P. 134.06; or
3. the appellate court determines that oral argument is unnecessary because:
  - a. the dispositive issue or set of issues has been authoritatively settled; or
  - b. the briefs and record adequately present the facts and legal arguments, and the decisional process would not be significantly aided by oral argument.

The clerk of the appellate court must notify the parties when oral argument will not be allowed under this provision. Any party so notified may request the court to reconsider its decision by serving on all other parties and filing with the clerk of the appellate courts a written request for reconsideration within five days of receipt of the notification that no oral argument will be allowed. If, under this provision, the court does not allow oral argument, the case must be considered as submitted to the court when the clerk of the appellate courts notifies the parties that oral argument has been denied.

The Court of Appeals may direct presentation of oral argument in any case.

(2) Except in exigent circumstances, the oral argument must be heard by the full panel assigned to decide the case, and in any event must be considered and decided by the full panel. The procedure on oral argument, including waiver and forfeiture of oral argument, must be as prescribed by the Minnesota Rules of Civil Appellate Procedure, unless this rule directs otherwise.

(Amended effective September 1, 2011; amended effective August 1, 2012; amended effective March 1, 2015.)

**Rule 28.03 Certification of Proceedings**

In the following circumstances, when any question of law arises that in the district court's opinion is so important or doubtful that the Court of Appeals should decide it, and the defendant requests or consents, the judge must report the case to present the question of law, and certify the report to the Court of Appeals:

- (1) at the trial of any person convicted in any court;
- (2) upon any motion to dismiss a charging document; or
- (3) upon any motion relating to the charging document.

Certification stays all proceedings in the district court until the Court of Appeals decides the question presented. The prosecutor must, upon certification of the report, promptly furnish a copy to the Minnesota Attorney General at the expense of the governmental unit responsible for the prosecution.

The court may stay other criminal cases it has pending that involve or depend on the same question, if the defendant so requests or consents to the stay, until the appellate court decides the certified question. Briefs must be filed and served as provided in Rule 28.04, subd. 2(3), unless the appellate court directs otherwise.

(Amended effective July 1, 2015.)

### **Rule 28.04 Appeal by Prosecutor**

**Subd. 1. Right of Appeal.** The prosecutor may appeal as of right to the Court of Appeals:

(1) in any case, from any pretrial order, including probable cause dismissal orders based on questions of law. But a pretrial order cannot be appealed if the court dismissed a complaint for lack of probable cause premised solely on a factual determination, or if the court dismissed a complaint under Minnesota Statutes, section 631.21;

(2) in felony cases, from any sentence imposed or stayed by the district court;

(3) in any case, from an order granting postconviction relief under Minnesota Statutes, chapter 590;

(4) in any case, from an order staying adjudication of an offense for which the defendant pleaded guilty or was found guilty at a trial. An order for a stay of adjudication to which the prosecutor did not object is not appealable;

(5) in any case, from a judgment of acquittal by the district court entered after the jury returns a verdict of guilty under Rule 26.03, subd. 18(2) or (3);

(6) in any case, from an order of the district court vacating judgment and dismissing the case made after the jury returns a verdict of guilty under Rule 26.04, subd. 3;

(7) in any case, from an order for a new trial granted under Rule 26.04, subd. 1, after a verdict or judgment of guilty, if the district court expressly stated in its order or in an accompanying memorandum that it based its order exclusively on a question of law that, in the opinion of the district court, is so important or doubtful that the appellate court should decide it. However, an order for a new trial cannot be appealed if based on the interests of justice.

**Subd. 2. Procedure Upon Appeal of Pretrial Order.** The procedure upon appeal of a pretrial order by the prosecutor is as follows:

(1) Stay. Upon oral notice that the prosecutor intends to appeal a pretrial order, the district court must stay the proceedings for five days to allow time to perfect the appeal.

The oral notice must include a statement for the record explaining how the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial.

(2) Notice of Appeal. The prosecutor must file with the clerk of the appellate courts:

(a) a notice of appeal;

(b) the statement of the case provided for by Minn. R. Civ. App. P. 133.03, which must also include a summary statement by the prosecutor explaining how the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial; and

(c) a copy of the written request to the court reporter for a transcript of the proceedings as appellant deems necessary.



The prosecutor must submit with the notice of appeal, the statement of the case, and request for transcript at the time of filing, proof of service of these documents on the defendant or defense counsel, the State Public Defender's office, the Minnesota Attorney General, and the court administrator.

Failure to serve or file the statement of the case, to request the transcript, to file a copy of such request, or to file proof of service, does not deprive the Court of Appeals of jurisdiction over the prosecutor's appeal, but permits action the Court of Appeals deems appropriate, including dismissal of the appeal. The contents of the notice of appeal must be as set out in Rule 28.02, subd. 4(2).

(3) Briefs. The prosecutor must file the appellant's brief with the clerk of appellate courts, with proof of service on the respondent, within 15 days of delivery of the transcript.

If the court reporter delivered the transcript before the prosecutor filed the notice of appeal, or if the prosecutor did not request any transcript under Rule 28.04, subd. 2(2), appellant must file the appellant's brief with the clerk of the appellate courts together with proof of service upon the respondent within 15 days after the prosecutor filed the notice of appeal.

Within eight days of service of appellant's brief upon respondent, the respondent must file the respondent's brief together with proof of service on the appellant. In all other respects, and to the extent applicable, the Minnesota Rules of Civil Appellate Procedure govern the form and filing of briefs and addenda, but the appellant's brief must contain a procedural history.

(4) Dismissal by the Minnesota Attorney General. In appeals by the prosecutor, the attorney general may, within 20 days after entry of the order staying proceedings, dismiss the appeal, and must within three days after the dismissal give notice of it to the court administrator and file it with the clerk of the appellate courts. The district court must then proceed as if no appeal had been taken.

(5) Oral Argument and Consideration. Rule 28.02, subd. 13 concerning oral argument applies to appeals by the prosecutor, but the date of oral argument or submission of the case to the court without oral argument cannot be later than three months after all briefs have been filed. The Court of Appeals must not hear or accept as submitted any appeals not argued or submitted before this period elapsed. If the case has not been argued or submitted within three months, the district court must proceed as if no appeal had been taken.

(6) Attorney Fees. Reasonable attorney fees and costs incurred must be allowed to the defendant on such appeal, and they must be paid by the governmental unit responsible for the prosecution.

(7) Joinder. The prosecutor may appeal several of the orders under this rule joined in a single appeal.

(8) Time for Appeal. The prosecutor may not appeal under this rule until after the Omnibus Hearing has been held under Rule 11, or the evidentiary hearing and pretrial conference, if any, have been held under Rule 12, and the district court has decided all issues raised.

The appeal then must be taken within five days after the defense, or the court administrator under Rule 33.03, serves notice of entry of the order to be appealed from on the prosecutor, or within five days after the district court notifies the prosecutor in court on the record of the order, whichever occurs first.

All pretrial orders entered and noticed to the prosecutor before the district court's final determination of all issues raised in the Omnibus Hearing under Rule 11, or in the evidentiary hearing and pretrial conference under Rule 12, may be included in this appeal.

An appeal by the prosecutor under this rule bars any further appeal by the prosecutor from any existing orders not included in the appeal. No appeal of a pretrial order by the prosecutor can be taken after jeopardy has attached.

An appeal under this rule does not deprive the district court of jurisdiction over pending matters not included in the appeal.

**Subd. 3. Cross-Appeal by Defendant.** When the prosecutor appeals, the defendant may obtain review of any adverse pretrial or postconviction order by filing a notice of cross-appeal with the clerk of the appellate courts, with proof of service on the prosecutor, within ten days after the prosecutor serves notice of the appeal. In postconviction cases, the notice of cross-appeal may be filed within 60 days after the entry of the order granting or denying postconviction relief, if that is later.

Failure to serve the notice does not deprive the Court of Appeals of jurisdiction over defendant's cross-appeal, but permits action the Court of Appeals deems appropriate, including dismissal of the cross-appeal.

**Subd. 4. Conditions of Release.** Upon appeal by the prosecutor of a pretrial order, Rule 6.02, subds. 1 and 2 govern the conditions for defendant's release. The court must also consider that the defendant, if not released, may be confined for a longer time pending the appeal than would be possible under the potential sentence for the offense charged.

**Subd. 5. Proceedings in Forma Pauperis.** An indigent defendant who wants the services of an attorney in an appeal by the prosecutor under this rule must proceed under Rule 28.02, subd. 5.

**Subd. 6. Procedure Upon Appeal of Postconviction Order.**

(1) Service and Filing. The prosecutor may appeal an order granting postconviction relief by filing a notice of appeal with the clerk of the appellate courts, with proof of service on the opposing counsel, the court administrator, and the Minnesota Attorney General. No fees or bond for costs are required for the appeal.

The statement of the case in Minn. R. Civ. App. P. 133.03 need not be filed, unless the appellate court directs otherwise.

Failure of the prosecutor to take any step other than timely filing the notice of appeal does not affect the validity of the appeal, but permits action the Court of Appeals deems appropriate, including dismissal of the appeal.

(2) Time for Taking an Appeal. An appeal by the prosecutor of an order granting postconviction relief must be taken within 60 days after entry of the order.

(3) Other Procedures. The following rules govern the below-listed aspects of prosecution appeals from an order granting postconviction relief under this rule.

- (a) Rule 28.02, subd. 4(2): the contents of the notice of appeal;
- (b) Rule 28.02, subd. 8: the record on appeal;
- (c) Rule 28.02, subd. 9: transcript of the proceedings and transmission of the transcript on record;
- (d) Rule 28.02, subd. 10: briefs;
- (e) Rule 28.02, subd. 13: oral argument;

(f) Rule 28.04, subd. 2(4): dismissal by the Minnesota Attorney General;

(g) Rule 28.04, subd. 2(6): attorney fees; and

(h) Rule 28.06: voluntary dismissal.

**Subd. 7. Procedure Upon Appeal From Order Staying Adjudication.**

(1) Service and Filing. The prosecutor may appeal an order staying adjudication by filing a notice of appeal with the clerk of the appellate courts, with proof of service on opposing counsel, the court administrator, the State Public Defender's office, and the Minnesota Attorney General.

The notice must be accompanied by a copy of a written request to the court reporter for a transcript of the proceedings, as appellant deems necessary. No fees or bond for costs are required for the appeal.

The statement of the case in Minn. R. Civ. App. P. 133.03 need not be filed, unless the appellate court directs otherwise.

Failure of the prosecutor to take any step other than timely filing the notice of appeal does not affect the validity of the appeal, but permits action the Court of Appeals deems appropriate, including dismissal of the appeal.

(2) Time for Taking an Appeal. An appeal by the prosecutor from an order staying adjudication must be taken within ten days after entry of the order.

(3) Briefs. The prosecutor must file and serve the appellant's brief and proof of service on the respondent with the clerk of the appellate courts within 15 days after delivery of the transcript.

If the court reporter delivered the transcript before the prosecutor filed the notice of appeal, or if the prosecutor did not request a transcript, the appellant must file the appellant's brief and proof of service on the respondent with the clerk of the appellate courts together within 15 days after the prosecutor filed the notice of appeal. The brief must identify itself as a stay of adjudication brief.

Within eight days after service of the appellant's brief, the respondent must file the respondent's brief and proof of service on the appellant. In all other respects, and to the extent applicable, the Minnesota Rules of Civil Appellate Procedure govern the form and filing of briefs and addenda, but the appellant's brief must contain a procedural history.

(4) Other Procedures. The following rules govern the below-listed aspects of prosecution appeals from an order staying adjudication:

(a) Rule 28.02, subd. 4(2): the contents of the notice of appeal;

(b) Rule 28.02, subd. 5: proceedings in forma pauperis;

(c) Rule 28.02, subd. 7: release of the defendant pending appeal;

(d) Rule 28.02, subd. 8: the record on appeal; and

(e) Rule 28.02, subd. 13: oral argument.

**Subd. 8. Procedure Upon Appeal From Judgment of Acquittal or Vacation of Judgment After a Jury Verdict of Guilty, or From an Order Granting a New Trial.**

(1) Service and Filing. The prosecutor may appeal these judgments or orders by filing with the clerk of the appellate courts a notice of appeal and proof of service on the opposing counsel,

the court administrator, and the Minnesota Attorney General. No fees or bond for costs are required for the appeal.

The statement of the case in Minn. R. Civ. App. P. 133.03 need not be filed, unless the appellate court directs otherwise.

Failure of the prosecutor to take any step other than timely filing the notice of appeal does not affect the validity of the appeal, but permits action the Court of Appeals deems appropriate, including dismissal of the appeal.

(2) Time for Appeal. An appeal by the prosecutor under this subdivision must be made within ten days after entry of the judgment or order.

(3) Stay and Conditions of Release. Upon oral notice that the prosecutor intends to appeal under this subdivision, the district court must order execution of the judgment or order stayed for ten days to allow time to perfect the appeal. The district court must also determine the conditions for defendant's release pending the appeal, which are governed by Rule 6.02, subds. 1 and 2.

(4) Other Procedures. The following rules govern the below-listed aspects of appeals by the prosecutor under this subdivision:

- (a) Rule 28.02, subd. 4(2): the contents of the notice of appeal;
- (b) Rule 28.02, subd. 8: the record on appeal;
- (c) Rule 28.02, subd. 9: transcript of the proceedings and transmission of the transcript and record;
- (d) Rule 28.02, subd. 10: briefs;
- (e) Rule 28.02, subd. 13: oral argument;
- (f) Rule 28.04, subd. 2(4): dismissal by the Minnesota Attorney General; and
- (g) Rule 28.04, subd. 2(6): attorney fees.

(5) Cross-Appeals. When the prosecutor appeals under this subdivision, the defendant may obtain review of any adverse pretrial and trial orders and issues by filing a notice of cross-appeal with the clerk of the appellate courts, with proof of service on the prosecutor, within 30 days of the prosecutor filing notice of appeal, or within ten days after delivery of the transcript by the reporter, whichever is later.

If the defendant makes this election, and the jury's verdict is ultimately reinstated, the defendant may not file a second appeal from the entry of judgment of conviction unless it is limited to issues, such as sentencing, that could not have been raised in the cross-appeal.

The defendant may also elect to respond to the issues raised in the prosecutor's appeal and reserve appeal of any other issues until such time as the jury's verdict of guilty is reinstated. If reinstatement occurs, the defendant may appeal from the judgment using the procedures in Rule 28.02, subd. 2.

(Amended effective September 1, 2011; amended effective March 1, 2015.)

### **Rule 28.05 Appeal from Sentence Imposed or Stayed**

**Subd. 1. Procedure.** The following procedures apply to the appeal of a sentence imposed or stayed under these rules:

(1) Notice of Appeal and Briefs. Any party appealing a sentence must file with the clerk of the appellate courts, within 90 days after judgment and sentencing:

(a) a notice of appeal; and

(b) proof of service of the notice on opposing counsel, the Minnesota Attorney General, the court administrator, and in the case of prosecution appeals the State Public Defender's office.

If all transcripts necessary for the appeal have already been transcribed when the appellant files the notice of appeal, the party appealing the sentence must file with the notice of appeal an informal letter brief in the number of copies prescribed by standing order of the appellate court, which must identify itself as a sentencing appeal brief, with proof of service on opposing counsel, the Minnesota Attorney General, and in the case of prosecution appeals the State Public Defender's office. The brief must set out the arguments concerning the illegality or inappropriateness of the sentence.

When the transcripts necessary for the appeal have not been transcribed, the appellant must file with the notice of appeal a request for transcripts, and proof of service of the request on opposing counsel, the Minnesota Attorney General, the court administrator, and in the case of prosecution appeals, the State Public Defender's office.

Appellant's brief must be identified as a sentencing appeal brief and must be served and filed within 30 days after delivery of the transcript. The clerk of the appellate courts must not accept a notice of appeal from sentence unless accompanied by the requisite briefs or transcript request and proof of service.

A defendant appealing the sentence and the judgment of conviction may combine the two into a single appeal; when this option is selected, the procedures in Rule 28.02 continue to apply.

(2) Transmission of Record. Upon receiving a copy of the notice of appeal, the court administrator must immediately forward to the clerk of the appellate courts:

(a) a transcript of the sentencing hearing, if any;

(b) the sentencing order required in Rule 27.03, subd. 7, with the department report, if any;

(c) the sentencing guidelines worksheet; and

(d) any presentence investigation report.

(3) Respondent's Brief. Within ten days of service on respondent of appellant's brief, a respondent choosing to respond must serve an informal letter brief on appellant and file with the clerk of the appellate courts the number of copies prescribed by standing order of the appellate court.

(4) Reply Brief. Appellant may serve and file a reply brief within five days after service of the respondent's brief.

(5) Other procedures. The following rules govern the below-listed aspects of sentencing appeals:

(a) Rule 28.02, subd. 4(2): the contents of the notice of appeal;

(b) Rule 28.02, subd. 5: proceedings in forma pauperis;

(c) Rule 28.02, subd. 6: stays;

(d) Rule 28.02, subd. 7: release of the defendant on appeal; and

(e) Rule 28.02, subd. 13: oral argument.

**Subd. 2. Action on Appeal.** The appellate court may review the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the sentencing court's findings of fact. This review exists in addition to all other powers of review.

The court may:

(a) dismiss or affirm the appeal;

(b) vacate or set aside the sentence imposed or stayed and direct entry of an appropriate sentence; or

(c) order further proceedings as it may direct.

(Amended effective July 1, 2010; amended effective March 1, 2015.)

### **28.06 Voluntary Dismissal**

If the appellant files with the clerk of the appellate courts a notice of voluntary dismissal, with proof of service upon counsel for respondent, the appellate court may dismiss the appeal. If the appellant was the defendant in the district court, the notice must be signed by the appellant, as well as appellant's legal counsel, if the appellant is represented.

(Added effective September 1, 2011.)

### ***Comment - Rule 28***

*Under Rule 28.02, subd. 1 the defendant may obtain review of lower court orders and rulings only by appeal except as may be provided in the case of the extraordinary writ authorized by Minnesota Constitution, article VI, section 2, and the postconviction remedy, Minnesota Statutes, chapter 590. The statutory authorization for the extraordinary writs is contained in Minnesota Statutes, section 480A.06, subdivision 5, and chapters 586 (Mandamus), 589 (Habeas Corpus), and 606 (Certiorari). The procedure for obtaining writs of mandamus or prohibition appears in Minn. R. Civ. App. P. 120 and 121.*

*A defendant cannot as a matter of right appeal from a stay of adjudication entered under Minnesota Statutes, section 152.18, subdivision 1, which requires the consent of the defendant. However, a defendant may seek discretionary review of such a stay under Rule 28.02, subd. 3. State v. Verschelde, 595 N.W.2d 192 (Minn. 1999).*

*Rule 28.02, subd. 3 (Discretionary Review) is taken from Minn. R. Civ. App. P. 105, which sets forth the procedure to be followed by a defendant in seeking permission to proceed with an appeal from an order not otherwise appealable. A defendant seeking to appeal from a sentence imposed or stayed in a misdemeanor or gross misdemeanor case would have to proceed under this rule.*

*Rule 28.02, subd. 4(4) establishes a procedure by which a defendant who has initiated a direct appeal may nonetheless pursue postconviction relief. Certain types of claims are better suited to the taking of testimony and fact-finding possible in the district court, and defendants are encouraged to bring such claims, such as ineffective assistance of counsel where explanation of the attorney's decision is necessary, through postconviction proceedings rather than through direct appeal. See Black v. State, 560 N.W.2d 83, 85 n.1 (Minn. 1997). The order staying the appeal may provide for a time limit within which to file the postconviction proceeding.*

*Under Rule 28.02, subd. 9 (Transcript of Proceedings and Transmission of the Transcript and Record), the transcript must be ordered within 30 days after filing of the notice of appeal rather than within ten days as otherwise provided by Minn. R. Civ. App. P. 110.02, subd. 1. The provisions of Minn. R. Civ. App. P. 110 and 111 concerning the content and transmission of the record and transcripts apply to criminal appeals under Rule 28. Therefore, except as provided in Rule 28.02, subd. 5(12), it is necessary in a criminal appeal on ordering the transcript to serve and file a transcript certificate as required by Minn. R. Civ. App. P. 110.02, subd. 2. If either of the parties questions the accuracy of the court reporter's transcript of a videotape or audiotape exhibit, that party may seek to correct the transcript either by stipulation with the other party or by motion to the district court under Minn. R. Civ. App. P. 110.05*

*To the extent that an order granting a defendant a new trial also suppresses evidence, it will be viewed as a pretrial order concerning the retrial and the prosecutor may appeal the suppression part of the order under Rule 28.04, subd. 1(1). *State v. Brown*, 317 N.W.2d 714 (Minn. 1982). In response to *State v. Lee*, 706 N.W.2d 491 (Minn. 2005), Rule 28.04 subd. 1(4), was revised to expressly permit a prosecutor to appeal a stay of adjudication ordered by the district court over the objection of the prosecutor.*

*A timely, good-faith motion by the prosecutor for clarification or rehearing of an appealable order extends the time to appeal from that order. *State v. Wollan*, 303 N.W.2d 253 (Minn. 1981). Originally under Rules 28.04, subd. 2(2) and (8) the prosecutor had five days from entry of an appealable pretrial order to perfect the appeal. It was possible for this short time limit to expire before the prosecutor received actual notice of the order sought to be appealed. These rules as revised eliminate this unfairness and assure that notice of the pretrial order will be served on or given to the prosecutor before the five-day time limit begins to run. In *State v. Hugger*, 640 N.W.2d 619 (Minn. 2002), the court held that in computing the five-day time period within which an appeal must be taken under Rule 28.04, subd. 2(8), intermediate Saturdays, Sundays, and legal holidays are excluded under Rule 34.01 before the additional three days for service by mail are added under Rule 34.04*

*Under Rule 28.04, subd. 2(2), failure to timely serve the notice of appeal on the State Public Defender is a jurisdictional defect requiring dismissal of the appeal. *State v. Barrett*, 694 N.W.2d 783 (Minn. 2005).*

*Absent special circumstances, failure of the prosecutor to file the appellant's brief within the 15 days as provided by Rule 28.04, subd. 2(3) will result in dismissal of the appeal. *State v. Schroeder*, 292 N.W.2d 758 (Minn. 1980).*

*Rule 28.05, subd. 2 (Action on Appeal) is taken from Minnesota Statutes, section 244.11.*